(1)

91-185

No.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

UNITED STATES OF AMERICA

v.

MICHAEL S. ANTOON, M.D.

PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 13, 1991

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED BY RULING THAT THE CONSENT OF WITNESS DONALD MILLAR TO TAPE RECORD A CONVERSATION BETWEEN HE AND THE PETITIONER WAS NOT INVOLUNTARY.

LIST OF PARTIES

The parties involved in this appeal are:

Michael S. Antoon, Petitioner by Ambrose and Friedman, Leonard G. Ambrose III, Counsel for Petitioner; and United States of America, Respondent, by Thomas W. Corbett, Jr., United States Attorney for the Western District of Pennsylvania and Bonnie R. Schlueter, Assistant United States Attorney.

This case arises from an indictment which was returned in the Western District of Pennsylvania which originally named three co-defendants. Indicted with Michael S. Antoon were: John A. Bettor and Xavier W. Folino. Neither Bettor nor Folino are parties before this Court.

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The United States Court of Appeals for the Third Circuit rendered a decision and written opinion in this matter. The correct citation for that decision is United States of America v. Michael S. Antoon; John A. Bettor; Xavier W. Folino, d/b/a Fairview Pharmacy, No. 90-3739 (3rd Circuit May 13, 1991). (R. 16)

By order dated June 5, 1991 signed by the Honorable Robert E. Cowen, Circuit Judge of the United States Court of Appeals for the Third Circuit, the Petition for Rehearing filed by Michael S. Antoon was denied. (R. 38)

This case came before the United States Court of Appeals for the Third Circuit on Interlocutory Appeal by the United States of America pursuant to the provisions of 18 U.S.C. sec. 3731. The government appealed a decision of the United States District Court for the Western District of Pennsylvania, the Honorable Maurice B. Cohill, Chief Judge, presiding, dated October 22, 1990. (R. 1)

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Pennsylvania had jurisdiction over this criminal action by virtue of 28 U.S.C. sec. 3231. The United States District Court entered an Order suppressing evidence on October 22, 1990 from which the government took an appeal. The United States Court of Appeals for the Third Circuit exercised interlocutory appellate jurisdiction pursuant to 18 U.S.C. sec. 3731. By opinion and order dated May 13, 1991 the United States Court of Appeals for the Third Circuit reversed the suppression order of the United States District Court for

the Western District of Pennsylvania. (R. 17) Michael S. Antoon's Petition for Rehearing with suggestion of rehearing en banc was denied by Order of the United States Court of Appeals for the Third Circuit dated June 5, 1991. (R. 38)

Michael S. Antoon, petitioner herein seeks a Writ of Certiorari to this Court. This Court has jurisdiction to issue a Writ of Certiorari by virtue of 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application and interpretation of a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The specific statutory provision at issue is codified at 18 U.S.C. sec. 2511(2)(c). That section reads as follows:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. sec. 2511(2)(c)

STATEMENT OF THE CASE

On February 16, 1990 a grand jury sitting in the Western District of Pennsylvania, Erie Division, returned an indictment naming the petitioner, Michael S. Antoon and two others as defendants. The indictment contained 298 counts. Each of the three defendants are medical professionals. Antoon and John Bettor are physicians. Xavier Folino is a pharmacist. It is alleged that each of the three defendants conspired and violated federal narcotics laws. The crux of the government's allegations is that the defendants conspired to issue prescriptions for nonvalid medical reasons thereby obtaining and

distributing the prescription medications. Additionally, two parcels of real property owned by the petitioner, Michael S. Antoon, are subject to forfeiture claims at counts 297 and 298 of the indictment.

As the allegations contained in the indictment accused the defendants of violations of the federal narcotics laws, federal jurisdiction was premised upon 18 U.S.C. Sec. 3231.

Donald Millar is a certified paramedic employed by the Emergycare Ambulance Service in the City of Erie, Pennsylvania. He received his training and was certified in 1979. The

petitioner, Michael S. Antoon, (hereinafter Antoon) was the program coordinator of Millar's training.

Millar and Antoon became very friendly. They would see each other on professional and social occasions. They were very close friends.

Millar was approached sometime during the latter part of April of 1989 by Trooper Charles Lewis of the Pennsylvania State Police. The meeting lasted approximately one hour. During the meeting Trooper Lewis showed Millar copies of prescriptions which had been issued by Antoon. Lewis told Millar that the prescriptions were not written for a valid medical reason. In so

doing, Lewis instilled the fear of prosecution into Millar.

There was a subsequent meeting between Millar and Trooper Lewis along with other agents of the government. At the subsequent meeting the agents explained to Millar that he was facing criminal charges for conspiracy to possess and distribute controlled substances. In fact, there were three different occasions at which meetings occurred between Millar and agents of the government between May 2 and May 11, 1989. All of those meetings were in person. They occurred at various places, including a task force house and the FBI office.

During each of the meetings that occurred between Millar and the government agents, there was discussion regarding the prescriptions which had been issued to Millar. Each time the agents would strike fear in Millar by discussing his criminal exposure. There was also discussion between Millar and the agents regarding the impact that criminal accusations would have upon his job as a paramedic. As a result of the persistent pressure, Millar began to feel trapped.

Finally there was a meeting in the FBI office located in the courthouse in Erie, Pennsylvania. Present at that meeting were Millar, Trooper Lewis and

Agent Langer of the FBI. There were also additional agents, the names of whom Millar could not recall. Again, there was discussion about the criminal charges facing Millar. There was also discussion regarding the impact that criminal accusations would have upon Millar's employment as a paramedic. Millar felt pressured. He felt trapped. He was in a room with four agents of the government. They told him that he would not be charged. His understanding was that in order to avoid charges he would have to wear a wire and engage Antoon in conversations seeking to incriminate Antoon. Millar felt cornered. He felt he had no

alternative. Millar cared very deeply about Antoon. He had no motive to bring harm upon Antoon. The only reason he agreed to wear the wire was due to the pressure and artful coercion employed by the government agents. In his own words, Millar was being "squeezed" by the government agents. (R. 24-25)

On May 11, 1989 the agents fitted a Nagra body recording device upon Millar and sent him to engage Antoon in conversation. The agents instructed Millar to secure inculpatory admissions from Antoon. The agents designed the agenda that Millar was to follow regarding his conversation with Antoon.

Millar told Antoon during the conversation that the fear and pressure

he was experiencing was burning a hole in his stomach. Millar told Antoon that he had been threatened with prosecution of conspiracy and perjury. Millar also indicated that the agents had accused him of selling drugs which had been acquired by Millar by way of prescription from Antoon.

During the conversation certain references were made by Antoon which have a tendency to inculpate him regarding the allegations contained in the indictment.

Unsatisfied with just a single conversation, the agents pressed Millar into attempting subsequent conversations

with the defendant. Those subsequent attempts were done at the insistence of the agents. The subsequent attempts to contact Antoon by Millar were both telephonic and in person. They proved unsuccessful. When the subsequent attempts to reach Antoon were not successful, Millar experienced a sense of relief. He was relieved because he did not want to do anything to hurt his friend Michael Antoon. Ultimately, he had agreed to engage Mike Antoon in recorded conversations because the agents made him feel that he had no choice. (R. 14)

An evidentiary hearing was held before the Honorable Maurice B. Cohill, Chief Judge of the United States

District Court for the Western District of Pennsylvania on October 22, 1990. After hearing the testimony of Millar, listening to arguments of counsel, and reviewing the applicable legal standard, Judge Cohill made a factual finding that Donald Millar's consent to wear the body recording device was involuntary. Judge Cohill found that Millar's consent to wear the body recording device was the result of a coercive overbearing of his will. He therefore suppressed the tape recorded evidence. (R. 15)

The government elected to take an interlocutory appeal. The issue was briefed by the parties before the United States Court of Appeals for the Third Circuit. Oral argument before a panel

of the United States Court of Appeals for the Third Circuit took place on April 9, 1991. In an opinion filed May 13, 1991 the United States Court of Appeals for the Third Circuit reversed the suppression order of Judge Cohill. In so doing the Third Circuit held that Judge Cohill's factual finding that Millar's consent was involuntary, was clearly erroneous. (R. 29)

Antoon filed a timely petition for rehearing with a suggestion of rehearing en banc. By Order dated June 5, 1991 the United States Court of Appeals for the Third Circuit denied Antoon's Petition for Rehearing with suggestion of rehearing en banc.

(R. 38) Antoon now comes before this Court seeking a Writ of Certiorari.

ARGUMENT

WHETHER THE CIRCUIT COURT ERRED BY RULING THAT THE CONSENT OF WITNESS DONALD MILLAR TO TAPE RECORD A CONVERSATION BETWEEN HE AND THE PETITIONER WAS NOT INVOLUNTARY.

The Court of Appeals substituted its factual findings for those of the District Court in the case at bar. This grossly exceeds proper appellate review under the clearly erroneous standard. There is a split of authority among the various circuit courts of appeals regarding the proper test of voluntariness of consent to tape record a conversation under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. sec. 2510 et

seq. This Court should grant certiorari so as to unify the law regarding the proper test of voluntariness of consent to tape record a conversation pursuant to 18 U.S.C. sec. 2511(2)(c).

This Court has previously decided that the introduction of tape recordings of private conversations at a criminal trial do not violate Fourth Amendment rights of the accused or constitutional or statutory privacy interests if one party to those conversations voluntarily consents to their recording. U.S. v. Caceres, 440 U.S. 741, 744, 99 S.Ct. 1465, 1467, 59 L.Ed2d 733 (1979), U.S. v. White, 401 U.S. 745, 750, 91 S.Ct. 1122, 1125, 28 L.Ed.2d 453 (1971). However, the review of constitutional

precedent regarding the voluntariness of consent is necessary in fashioning the appropriate test of voluntariness of consent to a tape recorded conversation. In U.S. v. Kelly, 708 F.2d 121, 125 (3rd Cir. 1983), the Court articulated the test to be employed to determine whether a person's consent to the tape recording of a conversation is voluntary. In so doing, the Court relied upon prior decisions of this Court wherein the voluntariness of consent was examined involving issues under the Fourth and Fifth Amendment to the United States Constitution. As the Court stated:

> "Determining whether a person's consent to the recording of a

phone conversation is 'voluntary' is not a simple task. See Culombe v. Connecticut, 367 U.S. 568, 604-05, 81 S.Ct. 1860, 1880, 6L.Ed2d 1037 (1961)(Opinion of Frankfurter, J.). It is a question of fact, which the Court must determine from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed2d 854 (1973); U.S. v. Sanford, 673 F.2d 1070, 1072 (9th Cir. 1982); U.S. v. Brandon, 633 F.2d 773, 776 (9th Cir. 1980). Consent to a wire tap is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force. Schneckloth, 412 U.S. at 228, 93 S.Ct. at 2048; Osser, 483 F.2d at 730. An individual's decision to allow the police to record a phone conversation, however, is not necessarily involuntary just because that individual's motives were self-seeking or because he harbored expectations of personal benefit. Moskow, 588 F.2d at 891; Osser, 483 F.2d at 730. Rather consent will be considered voluntary if, from the totality of the circumstances, the trial

> court determines that the party agreeing to a wire tap did so consciously, freely, and independently and not as a result of coercive overbearing of his will. " Kelly, 708 F.2d at 125.

The Third Circuit is joined by the United States Court of Appeals for the Ninth Circuit in conducting a totality of the circumstances analysis to determine the voluntariness of consent. See U.S. v. Ryan, 548 F.2d 782, 791 (9th Cir. 1976), U.S. v. Sanford, 673 F.2d 1070, 1072 (9th Cir. 1982).

The United States Court of Appeals for the Second Circuit leads those Courts of Appeals which adhere to a different test of voluntariness of

consent to the tape recording of conversations. The Second Circuit announced its standard in U.S. v. Bonanno, 487 F.2d 654, 658-59 (2nd Cir. 1973). In announcing the opinion of the Court, Judge Friendly stated:

> "An informer's consent to the monitoring or recording of telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided sometime previously and entails no unpleasant consequences to him. Hence, it will normally suffice for the government to show that the informer went ahead with a call after knowing what the law enforcement officers were about." 487 F.2d at 658-59.

This less stringent analysis has been reaffirmed in the Second Circuit. See

U.S. v. Amen, 831 F.2d 373, 378 (2nd Cir. 1987), U.S. v. Barone, 913 F.2d 46, 49 (2nd Cir. 1990).

The standard set forth in Bonanno, supra, or one substantially similar to it, has been adopted by other circuit courts. In U.S. v. Jones, 839 F.2d 1041 (5th Cir. 1988), the court stated:

> "Although the burden is on the government to prove consent, in most cases we find voluntariness where 'the informant placed a telephone call knowing that it would be monitored.' U.S. v. Kolodziej, 706 F.2d 590, 593 (5th Cir. 1983)." Jones, 839 F.2d at 1050.

The United States Court of Appeals for the Seventh Circuit expressly adopted the standard announced by the Second Circuit in Bonanno,

supra. U.S. v. Horton, 601 F.2d 319, 323 (7th Cir. 1979), rehearing denied (August 27, 1979), cert. denied, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed2d 197 (1979).

Clearly the standards by which the voluntariness of consent to a tape recorded conversation under 18 U.S.C. sec. 2511(2)(c) are judged differ depending upon the circuit court conducting the scrutiny. In fact, the United States Court of Appeals for the Third Circuit expressly rejected the Second Circuit test of voluntariness. In so doing the Court stated:

> "We reject the government's argument that the Second Circuit's decision in U.S. v. Bonanno, 487 F.2d 654 (2nd Cir. 1973), requires us to apply a

> different test for determining whether an informer consented to the monitoring or recording of a telephone call. The government contends that Bonanno holds that a district court, when determining voluntariness, should only examine whether an informant went ahead with a phone call knowing that it was being recorded by the police. We disagree. We read Judge Friendly's decision as merely recognizing that the factual issue of consent is slightly different in cases where the defendant's consent to a physical search is at issue. In those cases the trial court has to determine whether the defendant voluntarily consented to a search contrary to his own interests, rather than whether an informer voluntarily consented to a decision 'which he has ordinarily decided sometime previously and which entails no unpleasant consequences.' Id. at 658." Kelly, 708 F.2d at 125 n.5.

The standard announced by the Third Circuit in Kelly, supra is the appropriate standard that should be used

in all federal courts. While it is true that consensual recordings under Title III do not raise constitutional concerns, there is no justification for employing a less stringent standard of voluntariness of consent. In a cogent and well reasoned dissenting opinion in U.S. v. Ryan, 548 F.2d 782, 792 (9th Cir. 1976), Judge Hufstedler joined by Judge Ely stated:

> "The District Court attempted to justify its conclusion that Mizera's consent was voluntary by suggesting that 'voluntariness' takes on a different meaning in the context of coerced confessions than it does in the context of consent to participation in monitoring or other activities protected by the Fourth Amendment. (Although the District Court found that the threatened denial of medical treatment was not coercive in the present case, it said that it

> would have 'great concern' if the case involved a confession or 'the waiver of a right associated with a fair trial.') This distinction in unfounded. Coercion does not evaporate with an assumed change in climate between the Fourth and Fifth Amendments. Nor does coercion become a free choice when it is applied to obtain consent rather than to force a confession." 548 F.2d at 794, Hufstedler, J. dissenting from denial of rehearing en banc.

This Court's totality of the circumstances analysis regarding the voluntariness of consent which was defined in Schneckloth v. Bustamonte, supra should be applied universally in the federal courts as the appropriate standard by which the voluntariness of consent to tape recorded conversations under 18 U.S.C. sec. 2511(2)(c) is analyzed.

In the case at bar the Circuit Court reviewed the transcript of the suppression hearing and substituted its factual findings for those of the District Court. This process of result-oriented analysis usurps the fact-finding function of the District Court and stands the clearly erroneous standard of review on its head. The District Court made a factual finding that Donald Millar's consent to the recording of his conversation with the defendant was not voluntary. (R. 15) That finding is deserving of the greatest respect and deference by the appellate court. The clearly erroneous standard of review allegedly employed by the Circuit Court in the case at bar was

correctly defined by the same court in Krasnov v. Dinan, 465 F.2d 1298, 1302 (3rd Cir. 1972). As the Court stated:

> "In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are left with a definite and firm conviction that a mistake has been committed (quoting Spire, Inc. v. Humble Oil and Refining Co., 403 F.2d 766, 770 (3rd Cir. 1968). It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may

> not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system, either by a American commonlaw tradition or by rule and statute." Krasnov v. Dinan, supra at 1302-1303.

The circuit court below expressly recognized that the clearly erroneous standard of review applied in the case at bar. Moreover, the circuit court below cited Krasnov v. Dinan, supra as correctly defining the clearly erroneous standard. (R. 23) As the Court below stated in the case at bar:

> "We must accord the District Court's conclusion that Millar's consent was involuntary great deference, unless our examination of the record shows that the District Court committed clear

> error. U.S. v. Hashagen, 816 F.2 893, 906 (3rd Cir. 1987). The District Court's conclusion will stand unless it '(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the support of evidentiary data.' Krasnov v. Dinan, 465 F.2d 1298, 1302 (3rd Cir. 1972)." U.S. v. Antoon, No. 90-3789, at p. 8 (3rd Cir. 1991) (R. 23).

After appropriately stating the correct standard of review, indeed defining the same, the Circuit Court ignored that standard and proceeded to make its own factual findings. This is precisely what the clearly erroneous standard of review is designed to prohibit.

There is very sound policy associated with the proper application

of the clearly erroneous standard. There is keen public interest in the stability and judicial economy that is promoted by recognition that the trial court and not the appellate tribunal should be the finder of fact. Permitting appellate courts to share more actively in the fact-finding function tends to undermine the legitimacy of the District Courts in the eyes of litigants. Appeals are multiplied since litigants are encouraged to retry the factual issues on appeal. It is a needless reallocation of judicial authority. See F.R.C.P., Rule 52(a), 42 U.S.C., official comment.

The suppression record indicated that Millar felt he was being "squeezed"

by the agents. (R. 24-25). During the several meetings that occurred between Millar and government agents there was always discussion regarding Millar's criminal exposure as well as the impact that criminal accusations would have upon his employment. (R. 13). There were multiple agents present during these meetings. (R. 14). Millar expressed that he did not wish to consent to the recording of his conversations with the defendant. (R. 14). This was a clear expression of Millar's true will. However, through the repetitive coercive tactics of the agents, Millar's will was overborne. His desire not to wear the recording

device was defeated by the pressure exerted upon him.

This Court should grant a Writ of Certiorari so as to reconcile the divergence of authority regarding the appropriate test of voluntariness of consent under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Additionally, this Court should grant a Writ of Certiorari so as to correct the inappropriate application of the clearly erroneous standard of review employed by the Circuit Court below.

CONCLUSION

The Petitioner, Michael S. Antoon, respectfully requests that this Honorable Court grant his Petition for Write of Certiorari so as to resolve the issues fairly raised herein.

Respectfully submitted,

Leonard G. Ambrose III

Leonard G. Ambrose III,
Attorney for Petitioner

91-185

(2)

No.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

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DATED MAY 13, 1991

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA
Plaintiff

v. Criminal No 90-5E

MICHAEL S. ANTOON
Defendant

MEMORANDUM OPINION

COHILL, Chief Judge

On October 22, 1990, we conducted a hearing on defendant Antoon's Motion to Suppress Electronically Recorded Statements. We orally granted the motion and write this Opinion to explain the reasons therefore.

Facts

On February 16, 1990, a Federal Grand Jury returned a 298 count

indictment charging various violations of the Drug Abuse Prevention and Control Act, 21 U.S.C. 801 et, seq., by three defendants, Michael S. Antoon, John A. Bettor, and Xavier W. Folino, d/b/a Fairview Pharmacy. On August 2, 1990, we granted the Government's Motion to Sever Trial of Defendants. After several continuances, the trial of defendant Antoon was scheduled to begin on October 23, 1990.

Defendant Antoon filed a timely "Motion to Suppress Electronically Recorded Statements and Request for an Evidentiary Hearing." The basis for this motion is that on May 11, 1989, one Donald Millar, a friend of defendant Antoon, at the behest of government agents, had recorded certain

conversations with him at defendant Antoon's house with a Nagra body recording device. The Nagra body recording device had been placed on Millar by government agents. Defendant Antoon asserted that the conversations should be suppressed for two reasons: first, that Donald Milar's consent to having the conversations recorded was not voluntary; second, tnat Assistant United States Attorney James Ross had violated Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility, adopted pursuant to Rule 22(B) of the Local Rules of Court for the Western District of Pennsylvania, in authorizing the government agents to record the conversations because he

allegedly knew that defendant Antoon was represented by counsel.

On October 22, 1990, this Court held an evidentiary hearing to consider this and other pretrial motions in defendant Antoon's case. After reviewing the applicable law and taking testimony of Mr. Millar, we concluded that Mr. Millar's cooperation with the government agents was not voluntary, and therefore, granted defendant Antoon's Motion to Suppress Electronically Recorded Statements.

After this decision, the government informed this Court that it would appeal the ruling. This Court then went ahead and considered the second issue of whether Assistant United

States Attorney James Ross had violated the disciplinary rule in authorizing the government agents to record the conversations. This Court concluded that he had not, after taking testimony and hearing oral arguments on the issue. Thus, if the Court of Appeals for the Third Circuit reverses this Court's decision to suppress, the tape and transcript of the recorded conversations would be admissible at trial.

Because this is the sort of issue which must be decided on a case-by-case basis, we thought it best to reverse the usual format of an opinion. Usually we recite the facts and then set forth what we believe the applicable law to be.

Here we will recite the law which we feel is applicable and then hold up for comparison the testimony of Donald Millar surrounding his consent in having a tape made of his conversation with defendant Antoon.

Applicable Law

The United States Code provides that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. 2511(2)(c) (Supp. 1990). At a criminal trial,

introduction into evidence of recordings of a defendant's private conversations does not violate the Constitution if the other party to those conversations voluntarily consented to the recording. United States v. Caceres, 440 U.S. 741, 744 (1979); United States v. Moskow, 588 F.2d 882, 891 (3rd Cir. 1978). Consent is a question of fact which the court must determine from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). Consent is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force. Id. at 228.

Determining whether consent is "voluntary" is not a simple task:

consent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to have his conversation recorded did so consciously, freely, and independently and not as a result of a coercive overbearing of his will. United States v. Kelly, 708 F.2d 121, 125 (3d Cir.), cert. denied, 464 U.S. 918 (1983). An individual's decision to allow the police to record a conversation, however, is not necessarily involuntary just because that individual's motives were self-seeking, because he expected a personal benefit, or because he expected continued favorble treatment. Id.; Moskow, 588 F.2d at 891.

Compare these cases with the oft-cited case of United States v. Laughlin, 222 F.Supp. 264, 266 (D.D.C. 1963) where the conversation was suppressed when the witness stated: "I felt I had to cooperate."

Discussion

The testimony of Mr. Millar left no doubt in our mind that his consent in taping his conversation with defendant Antoon was involuntary.[1]

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[1] We will quote extensively from Mr. Millar's testimony, given at the hearing on October 22, 1990. Citation to the transcript will be "T. page number/beginning line number-ending line number."

Under questioning by the Assistant United States Attorney, Mr. Millar stated that he agreed to wear a wire, T. 3/19-24, and that prior to wearing the wire, he had signed a consent form which stated in part: "I have given this written permission to the above-named special agents voluntarily, without threats or promises of any kind." T. 6/1-4.

The following colloquy then took place between the government attorney and the witness:

Q Did anyone threaten, coerce, or intimidate you in any way on that particular date into wearing the wire?

A It was always--as I've stated before, there's always a form of intimidation, of concern, but, no I voluntarily decided to cooperate because I had had a lack of conversation from Dr. Antoon concerning the situation.

Q All right. And can you tell the Court, please, why it was that you agreed to do this and why you went in to obtain this tape?

A It was initially indicated to me that there was discussion that the prescriptions were in my name and were supposedly asked for by me, and I just wanted to clear my name as far as the indications that all those prescriptions were

for my person. T. 6/12-25.

By itself, this testimony might place Mr. Millar's consent in the context of the Kelly, 708 F.2d at 125, and Moskow, 588 F.2d at 891, cases where the Court of Appeals for the Third Circuit stated that a person's decision in cooperating with government authorities in having their conversations recorded is not involuntary solely becasue they had a self-seeking motive. Quite a different picture emerged, however, when Mr. Millar was cross-examined.

He testified that when told criminal charges could be brought as a result of his involvement with particular prescriptions, he was "scared." T. 14/19-24 and T. 17/2-7.

The agents discussed conspiracy charges with him. T. 15/1-3. He stated that he was "nervous," T. 17/7, and afraid of being charged. T. 17/8-16. He also stated that he was concerned about losing his job as a paramedic because his boss was very much against the abuse of alochol and drugs. T. 18/20 to 19/4.

During the nine days from May 2, 1989 to May 11, 1989, agents met with him three times T. 20/5-6, and each time there was discussion about his exposure in the case, and he in turn each time expressed concern about his job. T.20/17-19.

Mr. Millar was asked if he saw himself as being "trapped" and answered, "I believe that's likely statement,

yes." T. 21/11-13.

On the day he signed the consent form, there were four agents with him, and again they discussed potential criminal charges against him, T. 22/25 to T. 23/3, and those charges in relationship to his job. T. 23/4-6. He testified that he did not see himself as having an alternative to taping the conversation. T.24/1-5.

He also felt there was "alot of pressure," T. 25/9, and finally testified that he felt he had no choice but to wear the wire. T. 32/15-18.

We believe the conclusion is inescapable. Mr. Millar, in his own words at different times felt, "scared," "nervous," "trapped," was concerned

about his job and saw himself as having no alternative. We feel that the situation here is much closer to that described in Laughlin, 222 F. Supp. at 266, where the witness "felt I had to cooperate" than the cases such as Moskow, 588 F.2d at 891, and Kelly, 708 F.2d 125, where the United States Court of Appeals for the Third Circuit ruled against suppression of the recorded conversations on the grounds that the witness' self-seeking motives did not make the taping involuntary.

What we heard adds up to consent not being voluntary, and therefore this recording was suppressed

Maurice B. Cohill, Jr.
Chief Judge

Filed May 13, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3739

UNITED STATES OF AMERICA

Appellant

v.

MICHAEL S. ANTOON; JOHN A. BETTOR;
XAVIER W. FOLINO d/b/a Fairview Pharmacy

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Cr. No. 90-00005-E)

Argued April 9, 1991

Before: STAPLETON, COWEN and ROSENN
Circuit Judges

(Opinion filed May 13, 1991)

Paul J. Brysh
Bonnie R. Schlueter (Argued)
Office of United States Attorney
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OPINION OF THE COURT

COWEN. *Circuit Judge.*

This appeal concerns the admissibility in a criminal trial of statements and conversations recorded by a witness wearing a concealed body recorder. The central issue is whether the witness' cooperation was voluntary or coerced. The district court excluded the evidence because it found that the witness' free will was overborne by his fear that he would be indicted as a co-conspirator if he refused to cooperate. Because we hold the district court clearly erred in concluding that the witness' consent was involuntary under the circumstances. we will reverse.

I.

Defendant Michael S. Antoon. M.D. and Donald Millar have been friends for more than ten years. They became acquainted through Millar's work as a paramedic servicing the Erie. Pennsylvania hospital where Antoon works as an emergency room physician. Over the years. they have become close social companions.

In 1988. the Federal Bureau of Investigation ("FBI"). the Drug Enforcement Agency ("DEA"). and the Pennsylvania State Police launched a narcotics

investigation of Antoon. They suspected that he was issuing phony prescriptions to obtain drugs to distribute illegally. On March 1, 1989, the three agencies executed a search warrant at Antoon's residence. Pursuant to the warrant, the agencies seized medical records, including copies of prescriptions, financial records, and various other documents from Antoon's home. Some of the prescriptions seized were written by Antoon to Millar for controlled substances.

Acting on this lead, Trooper Charles Lewis of the Pennsylvania State Police contacted Millar on May 2, 1989. Lewis telephoned Millar, told him he wanted to talk about Antoon, and arranged to interview Millar at his home later that day. At the meeting, which lasted approximately one hour, Lewis confronted Millar with copies of the prescriptions seized from Antoon's residence written in Millar's name. Lewis opined that the prescriptions were not issued for valid medical reasons and asked Millar if he had been aware of the improper purpose at the time. Millar admitted that he had been. He then confessed that he returned the pills to Antoon after filling the prescriptions.

Frightened by his conversation with Lewis, and aware that he potentially faced criminal charges for his involvement, Millar tried unsuccessfully to contact Antoon from May 2nd to May 11th. During that interval, Millar met with Lewis and other agents several times. At those meetings, Lewis and others suggested that Millar help the government. They asked Millar to wear a body recorder to record incriminating conversations with Antoon. They reminded Millar that he could be indicted as a co-conspirator and told him that he would not

be indicted if he wore the body recorder. They also reminded Millar that he could lose his job if he became implicated in a criminal matter. Millar, however, testified that no one told him he would be charged with a crime or lose his job if he refused to wear the wire.[1] Although Millar initially refused to help, he claimed that his resolve eroded when he was unable to contact Antoon. On May 11, 1989, Millar agreed to wear the body recorder and signed a consent to that effect.[2]

After obtaining Millar's signed consent in which he acknowledged that his consent was voluntarily

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1. Q: Did anyone say, if you don't wear this wire you will be charged with a crime?

   A: No

   Q: Did anyone say, if you don't wear this wire you'll lose your job?

   A: No.

   Q: Did anyone hold a gun to your head, or in another way say you have to wear this wire and go in there today?

   A: No.

App. at 161.

2. The consent read:

> I, Donald R. Millar . . . hereby authorize Charles Lewis, PSP, and Thomas D. Langer Special Agent of the Federal Bureau of Investigation, United States Department of Justice to place a body recorder and transmitter on my person for recording any conversations with Michael Antoon and others yet unknown which I may have on or about 5/11/89, and I have given this written permission to the above-named special agents voluntarily, without threats or promises of any kind.

App. at 133-134.

given, the agents fitted a Nagra body recorder on Millar. Later that day, Millar met with Antoon and recorded an incriminating conversation in which Antoon vaguely acknowledged that Millar would return to Antoon the drugs Antoon ostensibly prescribed for Millar. Millar subsequently attempted to arrange other conversations, but was unsuccessful.

On February 16, 1990, a federal grand jury indicted Antoon on various drug charges. The thrust of the indictment is that Antoon conspired to issue phony prescriptions in order to obtain and distribute controlled substances.[3] Millar was not indicted as a co-conspirator.

On April 24, 1990, Antoon filed a motion to suppress the conversations Millar recorded on May 11, 1989. Antoon contended that Millar had not cooperated with law enforcement officials voluntarily. At a pretrial hearing, Millar testified about the circumstances under which he consented to wear the body recorder. Based on Millar's testimony, the district court concluded that Millar's consent was involuntary, and ordered that the incriminating conversation was inadmissible. This appeal by the government followed. We have jurisdiction pursuant to 18 U.S.C. § 3731.

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3. Specifically, Count I alleges that Antoon conspired to distribute and possess with intent to distribute Schedule II controlled substances in violation of 21 U.S.C. § 846. Count II alleges that Antoon conspired to acquire and possess Schedule II controlled substances by fraud and deception in violation of 21 U.S.C. § 846. Counts III through CXIII allege that Antoon substantively violated 21 U.S.C. § 841(a)(3) by unlawfully distributing controlled substances. Counts CXIV through CXLV allege that Antoon violated 21 U.S.C. § 843(a)(3) by acquiring controlled substances by fraud.

II.

Under federal law, it is illegal to use the contents of an electronically recorded conversation, unless a party to that conversation consents. Specifically, 18 U.S.C. § 2511(1)(d) makes it illegal to use the contents of any wire, oral, or electronic communication where the information was obtained through an interception in violation of subsection 2511(1).[4] Under 18 U.S.C. § 2511(2)(c), it is not unlawful for a person acting under color of law to intercept a communication, where a party to that communication has given prior consent.[5] Because of section 2511(1)(d), the United States cannot *use* intercepted communications in a criminal prosecution unless a party to the communication first consented to the interception pursuant to section 2511(2)(c). In the case at bar,

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4. 18 U.S.C. § 2511(1) reads:

> (1) Except as otherwise specifically provided in this chapter any person who –
>
> > (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

5. 18 U.S.C. § 2511(2)(c) reads:

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

the United States cannot use the conversation Millar recorded against Antoon unless Millar gave prior consent to record it.

Although the right at stake in an exclusionary hearing to prevent admission of conversations recorded in violation of 18 U.S.C. § 2511 is statutory, not constitutional, we look to Fourth Amendment precedent to determine whether a party to a communication consented to an interception within the meaning of 18 U.S.C. § 2511. *See, e.g., United States v. Kelly*, 708 F.2d 121, 125 (3d Cir.), *cert. denied*, 464 U.S. 916 (1983) (*citing Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) as setting forth the relevant contours of what constitutes voluntary consent). We must therefore apply *Bustamonte* to determine whether Millar's consent to wear the body recorder was "free" and "voluntary."

Under the *Bustamonte* framework, consent is a question of fact determined from the totality of the circumstances. Under the totality of the circumstances test, consent is not voluntary merely because a person makes a "knowing" choice among alternatives. *Bustamonte*, 412 U.S. at 224. The ultimate test of voluntariness is whether, under the circumstances, the consent was an exercise of free will or whether the actor's free will "has been overborne and his capacity for self-determination critically impaired." *Id.* at 225.[6]

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6. The Court lists some factors that can affect the balance in particular cases. They include the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as sleep or food deprivation. *Bustamonte*, 412 U.S. at 226.

Consent to a wiretap is not voluntary where "it is coerced, either by explicit or implicit means or by implied threat or covert force." *Kelly*, 708 F.2d at 125. Thus, we must examine the circumstances surrounding Millar's consent to determine if it was a product of his free will, or whether his will was overborne by explicit or implicit means.

Our inquiry into the voluntariness of Millar's consent is restricted. We must accord the district court's conclusion that Millar's consent was involuntary great deference, unless our examination of the record shows that the district court committed clear error. *United States v. Hashagen*, 816 F.2d 899, 906 (3d Cir. 1987). The district court's conclusion will stand unless it "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972).

III.

The core issue of this appeal then is whether there is any evidence to support the district court's conclusion that Millar's consent was coerced. Based on our review of the record, we conclude the district court committed clear error. Because our inquiry is fact specific, we attach the relevant portions of Millar's testimony as an appendix to this opinion.

Millar's testimony is devoid of minimum evidentiary support for the conclusion that his consent was involuntary. In his direct examination, Millar explained why he decided to wear the body recorder. "I voluntarily decided to cooperate because I had had a lack of conversation

from Dr. Antoon concerning the situation." App. at 134.[7] Because Millar was unable to contact Antoon after he was approached by the authorities, he was left to fend for himself. Millar was, as the saying goes, between a rock and a hard place. He could refuse to cooperate with the authorities and risk going to jail himself, or he could betray his friend, help the government, and stay out of jail. Millar decided to cooperate.

Millar offered another explanation for his cooperation — the desire to clear his name.

> It was initially indicated to me that there was discussion that the prescriptions were in my name and were supposedly asked for by me, and I just wanted to clear my name as far as the indications that all those prescriptions were for my person.

App. at 134. Millar evidently thought he had more to lose from allowing people to believe that he was using drugs, than from betraying his close friend.

Antoon concedes that Millar's direct examination strongly suggests that Millar's consent was voluntary, but argues that Millar's testimony on cross-examination showed that he consented only after his will was overborne by the authorities. On cross-examination, Millar was asked repeatedly by defense counsel if he felt trapped by the circumstances that led him to agree to wear the body recorder. Each time, he said that he had. Millar was also asked whether he was scared. He agreed that he was. Millar also acknowledged that in his conversation with Antoon, he had described

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7. References to pages in the Appendix are to the appendix record prepared by the parties on appeal, not the appendix attached to this opinion.

himself as feeling "squeezed" by the authorities. App. at 153-54.

The district court explicitly relied on this testimony in reaching its conclusion that Millar's free will was overborne. Antoon argues that we should defer to the district court's factual findings – i.e. that Millar's direct testimony was not believable and that his true feelings were expressed only on cross-examination. We cannot agree, however, that the determination of whether Millar's consent was voluntary hinges in this case on witness credibility. The salient facts are not in dispute. In addition, on redirect, Millar explained what he meant when he said he had no choice but to cooperate. He explained, "I just felt that I was in a situation that required me to do whatever was asked of me." App. at 161.

Obviously, it was Millar's apprehension of prosecution that persuaded him to cooperate, not any coercive statement or intimidation by any law enforcement official. Moreover, Millar testified that no one directly threatened to prosecute him if he refused to wear the body recorder. No one said that he would lose his job if he failed to cooperate. He agreed that no one ever 'held a gun to his head' and told him he had to wear the body recorder, or else. In sum, Millar never once said that his consent was involuntary or indicated that his will was overborne. While it may be true that he felt trapped (although he never used that word himself), there is no indication that Millar did anything but knowingly and intentionally choose between two unpleasant alternatives. Significantly, Millar testified in his own words that "I voluntarily decided to cooperate." App. at 134.

Other circumstances also lead us to conclude that Millar's consent was voluntary. First, Lewis

telephoned in advance and asked Millar if he could interview him about the ongoing Antoon investigation. Millar agreed. The fact that Lewis contacted Millar in advance and Millar agreed to meet Lewis at his home indicate that the meeting was voluntary. that Millar was not surprised by the visit. and that he had an opportunity to retain counsel. Second. the meeting with Lewis took place at Millar's home. in familiar. non-hostile surroundings. Millar was not detained for any period. Third. Millar went to the next meeting at the FBI office by invitation — again he was not forced to go and could have refused. Fourth. nine days elapsed between the time agents first suggested that Millar wear the body recorder and the time he actually agreed to do so. Millar had an opportunity to reflect and could have consulted an attorney during that time. Fifth. although authorities stated that they would *not* prosecute Millar if he wore the body recorder. no one said that they would prosecute him if he did not. Finally. Antoon has conceded that nothing the authorities did constituted police misconduct. These circumstances. together with Millar's own testimony demonstrate that the district court's conclusion that Millar's consent was involuntary is without support in the record.

Our conclusion is bolstered by the application of principles of voluntary consent in two cases involving allegedly illegal recordings. In the first. *United States v. Osser*. 483 F.2d 727. 730 (3d Cir.). *cert. denied*. 414 U.S. 1028 (1973). we held that a party's having hoped to benefit from his decision to allow the government to intercept and record a telephone conversation did not impair the voluntariness of consent for the purposes of the

rule forbidding electronic surveillance. We noted in *Osser*, however, that the actor's consent was free from a potentially coercive element present in this case. No implied threats were made to the cooperating witness, while in this case we recognize that there was hovering over Millar an implied threat of prosecution. Id. We are not persuaded, however, that under the circumstances of this case, that additional fact vitiated Millar's consent.

In *Kelly*, we wrote, "An individual's decision to allow the police to record a phone conversation . . . is not necessarily involuntary just because that individual's motives were self-seeking, or because he harbored expectations of personal benefit." *Kelly*, 708 F.2d at 125 (*citing United States v. Moscow*, 588 F.2d 882, 891 (3d Cir. 1978)). We stated, "[C]onsent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously, freely, and independently and not as a result of coercive overbearing of his will." *Kelly*, 708 F.2d at 125. *See also United States v. Kolodziej*, 706 F.2d 590 (5th Cir. 1983) (reversing the district court's decision to exclude intercepted communications because the district court's conclusion that consent was involuntary lacked support in the record). The district court's conclusion in *Kelly* rested on evidence that the cooperating witness may have consented while under the influence of drugs, that he feared physical pressure from the defendants whose conversations he agreed to record, that he was pressured by law enforcement officials, and that he was highly suggestible.

In reversing the district court, we stated, "The record reveals . . . that [the law enforcement officials] did not directly apply any coercion, physical or psychological . . . to obtain his cooperation in the monitoring of the telephone calls." *Kelly*, 708 F.2d at 125. In addition, the cooperating witness admitted that he knew he did not "have to go along" with the police when he decided to cooperate and that he did agree to allow the conversations to be recorded.

The record in this case is similar. Law enforcement officers did not directly apply any pressure. They merely told Millar what he admits he already knew – he could suffer serious consequences as a result of his illegal conduct. Millar's strongest statement to the contrary came in response to extremely leading questions on cross-examination when he testified that he felt "trapped," "squeezed," and "a lot of pressure." We must, however, consider this in light of his previous testimony in response to a question as to whether he had been intimidated or coerced when he stated there was always a "form of intimidation, of concern, but no, I voluntarily decided to cooperate because I had a lack of conversation from Dr. Antoon." App. at 134. We cannot say that any pressure Millar experienced was caused by the government offer. The pressure stemmed from Millar's knowledge that the government possessed substantial evidence linking Millar to a serious drug offense. Indeed, there is no evidence anywhere in the record before us that Millar felt more pressure to cooperate than any potential criminal defendant feels who has done wrong and been caught.

IV.

Under the circumstances, we cannot agree that Millar's will was overborne by the authorities. There is no evidence that law enforcement officials did anything to overcome Millar's free will. Rather, the evidence upon which the district court relied merely explains Millar's motive for cooperating. He could not reach Antoon, he wanted to clear his name, and he was trying to stay out of jail. No one improperly threatened to prosecute Millar if he refused to wear a body recorder. No one threatened to do anything which in any way would have been illegal or inappropriate. Of course, Millar did not *want* to hurt his friend, but he voluntarily chose to do so in the hope of minimizing the penal consequences of his own misconduct. The district court's conclusion that Millar did not voluntarily consent to wear the body recorder is clearly erroneous.

We will reverse the order of the district court which excluded the proffered evidence.

APPENDIX

Direct Examination

Q: Did anyone threaten, coerce, or intimidate you in any way on that particular date into wearing the wire?

A: It was always – as I've stated before, there's always a form of intimidation, of concern, but, no. I voluntarily decided to cooperate because I had had a lack of conversation from Dr. Antoon concerning the situation.

Q: All right. And can you tell the Court, please, why it was that you agreed to do this and why you went in to obtain this tape?

A: It was initially indicated to me that there was discussion that the prescriptions were in my name and were supposedly asked for by me, and I just wanted to clear my name as far as the indications that all those prescriptions were for my person.

App. at 134.

Cross-Examination

Q: You obviously knew, did you not, that criminal charges could be brought as a result of your involvement with these particular prescriptions?

A: Yes.

Q: And that made you scared; didn't it?

A: Yes.

Q: At a subsequent meeting you say that criminal charges were discussed. Did they discuss what particular criminal charges you were facing?

A: Conspiracy.

* * * *

Q: Mr. Miliar, when you met with Trooper Lewis, it's fair to say you were pretty scared; isn't that true?

A: That's correct.

Q: In fact, it's fair to say that you were very scared; isn't that true?

A: I was nervous about the situation, yes.

Q: You were afraid you were going to be charged with criminal violations here in Federal Court: isn't that correct?

A: That's correct.

Q: You were afraid you were going to be charged and convicted, and ultimately go to jail: isn't that correct?

A: I wasn't certain at that time what would happen.

Q: You were concerned about being convicted and going to jail: weren't you?

A: There's the possibility that existed, yes.

Q: And Trooper Lewis never told you you would not go to jail: did he?

A: No.

Q: Now, you also were concerned, were you not, about your job?

A: Yes.

* * * *

Q: In fact, if you lost that particular job you don't know what you would do: isn't that true?

A: That's true.

Q: You were thinking about that at that particular time you were talking to Trooper Lewis as well: isn't that correct?

A: That's correct.

* * * *

Q: You're talking to Trooper Lewis on May 2nd and you're thinking about all of these different things; isn't that true?

A: Yes.

Q: Your mind was racing; wasn't it?

A: I suppose.

Q: It's fair [to] say that you were close to a panic stage; isn't that true?

A: I don't know if you'd call it a panic stage. I was concerned.

* * * *

Q: After these meetings that you had with the agents between May the 2nd and May the 11th, or sometime during their occurrence, you began to look for a way out; isn't that true?

A: I'd assume, yes.

Q: You began to look for a way that you could get yourself out of this trap that you found yourself in; isn't that true?

A: Correct.

Q: And that's how you saw yourself, didn't you? You saw yourself as being trapped; isn't that true?

A: I believe that's [a] likely statement, yes.

* * * *

Q: And during this particular meeting there was discussion, wasn't there, about the criminal charges that you potentia[ly] faced?

A: Yes.

Q: And there was also discussion regarding your particular job, as you have already testified; isn't that correct?

A: That's correct.

* * * *

Q: And when you were finally in this particular position and there were four agents in the room, at that point in time they suggested to you that you wear a wire; is that correct?

A: That's correct.

Q: And they told you that any cooperation that you provided would be brought to the attention of the Court, or perhaps you would receive no charges at all; is that correct?

A: That's correct.

Q: In fact, they told you you wouldn't be charged; isn't that correct?

A: That's correct.

Q: But the only way that you wouldn't be charged is if you wore a wire; isn't that correct?

A: That's not how – what they indicated.

Q: That was your understanding, however; wasn't it?

A: At that time probably, yes.

Q: Regarding your decision to wear this particular wire, having found yourself in this trap that we've talked about, you didn't see yourself as having any real alternative; isn't that true?

A: True.

* * * *

Q: But the only reason you chose to wear the wire was because of the trap you found yourself in; isn't that true?

A: That's true.

Q: That was a bit of a dilemma for you, wasn't it?

A: Very much so.

Q: Now, one of the ways that you've testified that you felt in dealing with these agents was that you felt you were trapped.

It's also fair to say that you felt that they were squeezing you; isn't that true?

A: There was a lot of pressure, yes.

Q: In fact, the word "squeeze" was a word that you used, isn't that true, in your conversation with Mike Antoon?

A: Could have been. I don't recall exactly.

* * * *

[Millar reads a portion of transcript of tape recorded conversation]

Q: Okay. Now, does that refresh your recollection as to whether or not you used the word "squeeze" in describing how the agents were dealing with you?

A: Yes, it does.

Q: You used that word; didn't you?

A: Yes.

Q. And you weren't lying when you used that word; were you?

A: No.

Q: You were telling Mike Antoon the truth; isn't that true?

A: Yes.

* * * *

Q: But the bottom line is that when you put that recorder on and you agreed to go and engage Mike Antoon in conversations, you felt like you had no choice; isn't that true?

A: Yes.

App. at 142-143, 145, 146, 147, 149, 150-154, 160.

Redirect Examination

Q: Mr. Millar, you said you had no choice. Explain what you meant.

A: I just felt that I was in a situation that required me to do whatever was asked of me.

Q: Those were your feelings?

A: Yes.

Q: Did anyone say, if you don't wear this wire you will be charged with a crime?

A: No.

Q: Did anyone say, if you don't wear this wire you'll lose your job?

A: No.

Q: Did anyone hold a gun to your head, or in another way say you have to wear this wire and go in there today?

A: No.

Q: When you first talked with Trooper Lewis about wearing this wire, how many days in advance of actually wearing the wire, approximately, elapsed?

A: I don't recall. It was a week, two weeks. I don't know. I don't recall.

Q: So, you had a lot of time to think about it: did you not?

A: Yes.

App. at 161.

Recross Examination

Q: Mr. Millar, Mr. Ross asked you if you had a long time to think about this particular consent?

The fact of the matter is, the more you thought about it, the more trapped you felt: isn't that true?

> I don't know if I'd indicated [sic] as a trapped feeling: a very stressful feeling.

at 163.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3739

UNITED STATES OF AMERICA
Appellant

vs.

MICHAEL S. ANTOON; JOHN A. BETTOR: XAVIER W. FOLINO, d/b/a/ Fairview Pharmacy

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROSENN*, Circuit Judges

The petition for rehearing filed by appellee Michael Antoon in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the court,

/s ROBERT E. COWEN
Circuit Judge

Dated: June 5, 1991

* As to panel rehearing.

(3)

No. 91-185

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL S. ANTOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91–185

MICHAEL S. ANTOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence conversations recorded by a witness wearing a concealed body recorder.

1. On February 16, 1990, petitioner was indicted by a grand jury sitting in the United States District Court for the Western District of Pennsylvania. He was charged with conspiring to distribute and possess Schedule II controlled substances, in violation of 21 U.S.C. 846; with conspiring to acquire and possess Schedule II controlled substances by fraud and deception, in violation of 21 U.S.C. 841(a)(2); and

with multiple counts of acquiring controlled substances by fraud, in violation of 21 U.S.C. 843(a)(3).

Prior to trial, petitioner moved to suppress his recorded conversations, alleging that the government had forced the witness who had recorded conversations with petitioner to wear a body recorder. On October 22, 1990, the district court found that the consent of the witness to the wearing of the body recorder was involuntary and suppressed the recorded conversations as evidence. Pet. App. 1-16.

The court of appeals reversed. Pet. App. 17-29. The court ruled that the district court's conclusion that the witness did not voluntarily consent to wearing the body recorder was clearly erroneous. The court found no evidence that law enforcement officials did anything to overcome the free will of the witness, finding that the district court relied upon evidence that merely explained his motive for cooperating.

2. Petitioner contends (Pet. 23-40) that the court of appeals erred in ruling that the witness voluntarily consented to record the conversations. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court

of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45036

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.